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No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

BRIEF FOR *AMICI CURIAE* PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are law professors who specialize in evidence and criminal law and procedure.[1] As legal academics, *amici* have an interest in the consistent and correct application of the rules of evidence, and in reconciling those rules with the constitutional right to a fair trial.

The brief is joined by the following professors:

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel or party authored this brief in whole or part. Duke University School of Law supports faculty research and scholarship, and that financial support contributed to the costs of preparing this brief. Otherwise, no person or entity apart from the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Duke University is not a signatory to the brief, and the views expressed here are solely those of the *amici*. The parties' letters of consent to the filing of this brief have been filed with the Clerk's Office. Counsel of record received timely notice of the intent to file this brief.

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SUMMARY OF ARGUMENT

The rules prohibiting juror impeachment should give way to Sixth Amendment concerns when a jury member comes forward with evidence of racially or ethnically biased statements made during deliberations about a criminal defendant's guilt.

First, the fundamental unfairness of a guilty verdict tainted by racial prejudice raises particularly acute constitutional concerns. An essential component of the right to a fair criminal trial is an impartial jury, and racial or ethnic bias poses a unique threat to that impartiality. *See Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) ("If a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the Sixth Amendment's guarantee to a fair trial and an impartial jury."). Indeed, racial or ethnic prejudice against a defendant abridges the fair trial right almost "by definition." *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014).

Second, juror testimony is likely to be the only available evidence to establish such prejudice. The "usual safeguards" this Court has pointed to in prior cases about juror bias are not "sufficient to protect the integrity of the process" in cases of racial or ethnic bias during deliberations. *Id.* Both the substance and the structure of the juror statements here distinguish the issues from the considerations before the Court in earlier cases concerning exceptions to Rule 606(b). *Tanner v. United States*, 483 U.S. 107, 127 (1987), addressed juror competency rather than juror prejudice. The impairment in *Tanner* (intoxication) was also of a type that could be exposed through means other

than reliance on juror testimony. Intoxication may be observed in the courtroom and is also a potential subject of testimony by non-jurors. Similarly, the nature of the bias at issue in *Warger*—bias induced by a juror's "views about negligence liability for car crashes" that resulted from a prior accident involving her daughter, 135 S. Ct. at 529—differs from racial or ethnic prejudice against a defendant. It is significantly more likely to be discernable from external evidence or revealed during voir dire.

Third, the administrability concerns that arise with general claims of juror dishonesty or partiality are not present in the narrower and clearer case of expressly racist statements by deliberating jurors. The experience of jurisdictions that have admitted juror testimony on the limited question of racial or ethnic bias suggests that doing so will not meaningfully burden the courts or unduly infringe on juror privacy. These courts have continued to preclude impeachment of jurors unless there is objective verification that they made overtly racist statements focused on a criminal defendant's guilt or innocence.

Nor would any new procedural mechanisms be required to apply a constitutional exception to Rule 606(b). Pursuant to the enumerated exceptions to the rule, courts already consider juror testimony on "extraneous prejudicial information" such as media accounts and "outside influences" such as threats and bribes. And the factual question they would be considering here is an objective one: whether a racist comment about the defendant was uttered by a deliberating juror. Courts need not even inquire into the statement's effect on internal mental processes in order to address the issue of a remedy. The core

concerns about protecting deliberations that gave rise to Rule 606(b) thus are not implicated.

Finally, the policy justifications for Rule 606(b) are not served by applying it in this context. Permitting verdicts tainted by racial or ethnic bias to remain in place in the interest of "finality" does profound harm to the criminal justice system. When racial or ethnic prejudice comes to light but evidentiary rules bar its consideration, public confidence in the "integrity" of adjudication declines. Leaving potentially unconstitutional verdicts entirely "beyond effective reach" only promotes "irregularity and injustice." Fed. R. Evid. 606(b), Advisory Committee Note to subdivision (b).

When there is direct evidence that a deliberating juror expressed clear racial or ethnic bias, there is also a serious constitutional question about a fair and impartial jury. Courts should be permitted to consider juror testimony when faced with that question.

ARGUMENT

I. THE PARAMOUNT CONSTITUTIONAL CONCERN WITH RACIAL OR ETHNIC DISCRIMINATION AGAINST CRIMINAL DEFENDANTS SHOULD OVERRIDE THE EVIDENTIARY BAR TO IMPEACHMENT BY JUROR TESTIMONY.

This case arises at the intersection of the Sixth Amendment fair trial guarantee and the difficult and lasting problem of racial prejudice among jurors. As this Court has previously stated, "no right ranks higher than the right of the accused to a fair trial," *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984), and "the inestimable

privilege of trial by jury" underlies "the whole administration of criminal justice," *Holland v. Illinois*, 493 U.S. 474, 511 (1990) (Stevens, J., dissenting).

Racial or ethnic bias is an "especially pernicious" form of prejudice in the criminal justice process to which this Court has long applied special scrutiny. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *see also Georgia v. McCollum*, 505 U.S. 42, 58 (1992) (a defendant has "a right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice"); *Holland*, 493 U.S. at 511 (1990) (Stevens, J., dissenting) (noting the Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system").

The Court has been vigilant, for example, about state-sponsored prejudice when prosecutors exercise peremptory challenges of jurors for racially discriminatory reasons. *See Batson v. Kentucky*, 476 U.S. 79, 88 (1986). As the Court recently confirmed, "striking even a single prospective juror for a discriminatory purpose" violates the Constitution. *Foster v. Chatman*, 2016 WL 2945233 at *2 (U.S. May 23, 2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). Racial bias in the selection of jurors jeopardizes not only the fairness of the defendant's trial but the "very integrity of the courts." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). It damages "both the fact and the perception" of the jury's role as a "vital check against wrongful exercise of power by the State." *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

The Court should be no less vigilant when allegations arise that express racial or ethnic

prejudice has tainted a jury's deliberations. *Cf. McCollum*, 505 U.S. at 62 (Thomas, J., concurring) (cautioning against "exalting the rights of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death"). Indeed, "the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074, at 513 (2d ed. 2007); *see also Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013) (noting the "insidiousness of racial or ethnic bias").

In petitioner's case—which involves sexual assault and harassment charges—a seated juror argued during deliberations that "Mexican men take whatever they want," Pet. App. 4a, that "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women," *id.*, that "Mexican men [are] physically controlling of women because they have a sense of entitlement," *id.*, and that the juror's experience in law enforcement suggested that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls," *id.*

When prejudiced comments with this sort of racist substance taint a verdict, that defect in the proceedings requires closer scrutiny than other types of juror misconduct or bias. In the *Warger* case, for example, a juror's personal experience may have predisposed her to find for the defendant in a civil case involving a car accident. *See* 135 S. Ct. at 524-25. The Court found that the juror's partiality was "internal" to deliberations and covered by Rule 606(b). *Id.* at 530. But *Warger* did not involve the

sort of bigotry against a criminal defendant that the facts of the present case raise. Partiality in the form of explicit racial or ethnic prejudice "undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression." Wright & Gold § 6074, at 513. Racially motivated factfinders pose perhaps the greatest risk to a fair trial, and they should not find protection behind the no-impeachment rule. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879) (finding that prejudices against "particular classes" that "sway the judgment of jurors" "deny to persons of those classes the full enjoyment of that protection which others enjoy").

Bias, moreover, raises particularly significant constitutional issues in criminal cases, which is a context that *Warger* also did not present. *See Rose*, 443 U.S. at 563. The guarantee of an impartial jury "goes to the very integrity of the legal system." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). Fundamental fairness depends on factfinders who are free from any "predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989). Jurors are not "impartial" in the "constitutional sense of that term" if they have "strong and deep impressions" that "close the mind against the testimony that may be offered in opposition to them." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807); *see also Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"); *Aldridge v. United States*, 283 U.S. 308, 313 (1931) (stating that a "gross injustice" is perpetrated if a

juror "entertain[s] a prejudice which would preclude his rendering a fair verdict.").

In construing the common law precursor to 606(b), the Court has held that the no-impeachment rule must be sufficiently pliable to accommodate the interests of justice. There should be some measure of flexibility in the rule, the Court has recognized, because cases might arise in which its rigid application violates "the plainest principles of justice." *McDonald v. Pless*, 238 U.S. 264, 269 (1915) (quoting *United States v. Reid*, 53 U.S. 361, 366 (1851)); *see also Warger*, 135 S. Ct. at 529 n.3; *Clark v. United States*, 289 U.S. 1, 16 (1933). As the Court in *Warger* also noted, "[t]here may be cases of juror bias so extreme" that the no-impeachment rule must yield to constitutional concerns. 135 S. Ct. at 529 n.3.

For Rule 606(b) to accommodate juror testimony on the narrow question of racist comments during deliberations would also be consonant with the Court's broader jurisprudence about conflicts between fair trial rights and exclusionary rules. When evidentiary bars "insulate from discovery the violation of constitutional rights," they may "themselves violate those rights." Wright & Gold § 6074, at 513. Accordingly, the Court has also held that the rules of evidence must give way if they preclude "the meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324, 331 (2006); *see also Green v. Georgia*, 442 U.S. 95, 97 (1979) ("In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)); *Davis v. Alaska*, 415 U.S. 308, 320 (1974) ("The State's policy interest in protecting the

confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.").

When the Court balances competing interests to determine whether a defendant's fair trial rights should override an evidentiary exclusion, the central question is whether "the interests served by a rule justify the limitation imposed on a defendant's constitutional right." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). The policy interests behind enforcement of Rule 606(b) are simply "at their weakest" in cases of jury bias involving racial prejudice. *See* Wright & Gold § 6074, at 513. Because racial or ethnic animus by jurors poses a particular danger to fair trial rights, the Rule 606(b) bar should not preclude consideration of juror testimony about the narrow category of statements expressly revealing such prejudice during deliberations.

II. ALTERNATE MECHANISMS FOR UNCOVERING TAINTED DELIBERATIONS ARE INSUFFICIENT SUBSTITUTES FOR JUROR TESTIMONY ABOUT RACIAL OR ETHNIC BIAS.

An exception to the rule against juror impeachment is particularly important with respect to racial or ethnic bias because it is unlikely otherwise to be ferreted out. The *Tanner* Court envisioned safety valves through which alleged biases would be revealed and addressed despite the Rule 606(b) bar: mechanisms like external observation and the voir dire process, as well as non-juror or pre-verdict evidence of misconduct. 483 U.S. at 127. The Colorado Supreme Court in this case, and other courts that have followed similar

reasoning, relied on these safeguards to conclude that the *Tanner* protections are "also available to expose racial biases." *United States v. Benally*, 546 F.3d 1230, 1240 (CA10 2008), *cert. denied*, 558 U.S. 1051 (2009).

Yet visual observation by the judge, counsel, or court personnel can do little to bring racial or ethnic bias to light. Incompetence and prejudice reveal themselves differently. For example, non-jurors are unlikely witnesses to prejudicial statements about a defendant, even though they can often testify to misconduct like intoxication. Racial animus also lies especially well hidden. The bias at issue in *Warger*—a juror's sympathy with a defendant who had caused a car accident—might have been established through objective evidence about her personal history, or through statements that the juror made outside of the jury room. But evidence beyond the jury deliberations is unlikely to reveal a juror's racially discriminatory reaction to the evidence at trial. Although there could be indications of animus such as membership in certain groups, complaints involving other racial discrimination, or past behavior towards individuals of other races or ethnicities, those external signals would not necessarily connect to invidious discrimination against a criminal defendant.

Furthermore, the voir dire process itself will rarely uncover racial or ethnic prejudice in jurors. Voir dire questioning might expose incentives like the *Warger* juror's potential identification with the defendant because of her daughter's experience. Nothing inhibited the *Warger* juror from freely expressing her views about liability for car accidents during voir dire. When it comes to racial or ethnic bias, however, a juror can hardly be expected to

acknowledge that he harbors some prejudice. A juror "may have an interest in concealing his own bias" or may even be "unaware of it." *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., concurring); *see also* Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 91 (2007); Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 Pub. Opinion Q. 506, 507-09 (1998) (describing experiments on social pressure to conform to norms against prejudice). "Some jurors will intentionally deceive the courts, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant." Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 554 (1975). And "the more prejudiced or bigoted the jurors, the less they can be expected to confess forthrightly and candidly their state of mind in open court." *Id.*; *see also* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165, 201 (2011) ("Because jurors may have difficulty recognizing or admitting their biases, the potential for misrepresentations of bias may be even greater than it is for other types of juror misrepresentations.").

During the voir dire process in the present case, for example, prospective jurors were repeatedly asked routine questions about whether they could be "fair" and whether they had feelings "for or against" petitioner. Pet. App. 3a. No juror acknowledged any racial or ethnic bias. *Id.* Two of the seated jurors have since alleged that in the intimacy of the jury room, away from authority figures and public scrutiny in the courtroom, a juror made repeated

statements to the effect that the jury should convict the defendant "because he's Mexican." Pet. App. 4a. A juror's overt bias was clearly intertwined with consideration of the defendant's culpability. But the sole mechanism for addressing this "grave" instance of juror prejudice was consideration of statements made during deliberations and brought to light by a juror after the verdict. *United States v. Villar*, 586 F.3d 76, 87 (CA1 2009).

Although courts applying Rule 606(b) to potential racial or ethnic bias point to the possibility that jurors can express concerns about deliberations prior to the verdict, that rarely occurs. *See Kittle v. United States*, 65 A.3d at 1155; *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991). As in this case, jurors typically come forward only after a verdict is rendered. The Court's recent decision in *Warger* has also foreclosed post-trial evidence that a juror concealed biases during voir dire. 135 S. Ct. 521. *Cf.* West, *supra*, at 202 (advocating a 606(b) exception for cases in which juror statements during deliberations reveal a discrete misrepresentation about bias during voir dire).

Accordingly, post-verdict juror testimony is likely to be "the only available evidence to establish racist juror misconduct." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1596 (1988). And the surface protections that the Court referenced in *Tanner* will not suffice to protect Sixth Amendment rights. *See* West, *supra*, at 187 (concluding that the *Tanner* protections against juror bias and misconduct fail when it comes to racial bias in the deliberative process).

III. A NARROW EXCEPTION FOR CONSIDERATION OF JUROR TESTIMONY ABOUT DISCRIMINATORY STATEMENTS AS TO A DEFENDANT'S GUILT OR INNOCENCE IS WORKABLE AND CONSONANT WITH EXISTING EXCEPTIONS TO 606(b).

A narrow constitutional exception to consider juror testimony on racial or ethnic bias will not meaningfully increase the administrative burden on the courts or lead to undue harassment of jurors. In jurisdictions where it has been permitted, the potential ability to impeach jurors on these issues has not opened the door to juror testimony beyond a small subset of cases involving overt discrimination directed at the defendant. It has not required courts to evaluate mental processes of jurors in the context of deliberations. Nor is there any indication that the few claims of this nature have increased post-verdict juror harassment.

In the many courts that allow such impeachment, there has been no "barrage of postverdict scrutiny of juror conduct." *Tanner*, 483 U.S. at 120-21. In the nineteen federal and state jurisdictions that are already hospitable to juror impeachment on the question of racial or ethnic bias, decades of appellate case law reflect only thirty claims by defendants who sought to introduce juror testimony concerning racial or ethnic bias in deliberations. Experience thus suggests that these claims will arise infrequently and that courts can ably sort and evaluate them when they do.

Although a constitutional exception to Rule 606(b) will require more courts to engage in line-drawing, statements concerning explicit racial or

ethnic bias in the consideration of the defendant's guilt can be readily identified. Even in factual situations where prejudice is much harder to disentangle from the surrounding facts, such as prosecutorial bias in the exercise of peremptory challenges, the Court has stated that it cannot be "blind" to "the circumstances that bear upon the issue of racial animosity." *Foster*, 2016 WL 2945233 at *18. Yet in contrast to nuanced inquiries such as *Batson* challenges, an exception for racist statements during deliberations is circumscribed by inherent limiting principles. It extends only to express racial or ethnic animus pertaining to the defendant and addressed to the substance of the case.

The courts that have recognized a constitutional override in cases of alleged racial prejudice only hear testimony when the statements directly relate to the Sixth Amendment concern by implicating objective facts about the case. The Sixth Amendment issue arises when the juror's statements are linked with consideration of the defendant's guilt or innocence and "received and utilized by the jury in an evidentiary context." *Smith v. Brewster*, 444 F. Supp. 482, 490 (S.D. Iowa 1978). Accordingly, comments made by jurors to non-jurors, *Wright*, 559 F Supp. at 1129, statements to non-deliberating jurors, *United States v. Shalhout*, 507 Fed. Appx. 201, 207 (CA3 2012), and offhand remarks after a verdict had already been reached, *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158-59 (CA7 1987), have all been held inadmissible.

The statements in question must also be objectively verifiable and subject to corroboration. *See Perry v. Bailey*, 12 Kan. 539, 545 (1874) ("If one [juror] affirms misconduct, the remaining eleven can

deny."). The California Evidence Code, for example, permits juror testimony about statements made during deliberations, but only with regard to statements that give rise to a presumption of misconduct just because they were uttered. *See* Cal. Evid. Code § 1150(a); *In re Stankewitz*, 40 Cal. 3d 391, 398 (1985). The California courts have rejected speculative claims or subjective impressions of prejudice. *In re Stankewitz*, 40 Cal. 3d at 398.

In many other jurisdictions that permit juror impeachment to address racial prejudice, courts have similarly declined to review statements of bias that do not relate to "specific readily identifiable facts or actions as opposed to evidence of subjective mental attitudes on the part of a juror." *Laguer*, 571 N.E.2d at 376; *see also United States v. Brassler*, 651 F.2d 600, 603 (CA8 1981); *People v. Holmes*, 372 N.E.2d 656, 659 (Ill. 1978). A constitutional exception to Rule 606(b) thus would only render testimony about racist statements admissible when that testimony can be proven or disproven. The objective verifiability of the evidence alleviates any concern with juror fraud or the possibility that a disgruntled juror could invent misconduct.

Furthermore, only overtly racist statements directed at the evidence—not stray remarks, insults exchanged between jurors, or even indications of general bigotry unrelated to the defendant—would render statements during deliberations admissible. *See Villar*, 586 F.3d at 87; *Shalhout*, 507 Fed. Appx. at 206-07 Despite the permissive approach to juror impeachment in the California rules, for example, courts there have held that the statements in question must constitute more than mere suggestions of racist thinking. *See People v. Steele*, 4 P.3d 225, 248 (Cal. 2002). Accordingly, courts have

rejected testimony concerning general references to racial stereotypes during deliberations, as well as alleged statements equally applicable to gang membership or racial status. *See People v. Ali*, 2013 WL 452901, at *19 (Cal. Ct. App. Feb. 7, 2013).

Nor would broader application of the constitutional exception significantly alter jurors' post-trial interactions with counsel and investigators. In states that recognize the exception, as in states that do not, juror contact rules and ethical canons already discourage parties from seeking juror statements after trial. The Colorado Code of Professional Conduct, for example, prohibits post-discharge communications with jurors that involve "misrepresentation, coercion, duress or harassment." Colo. R. Prof'l Conduct 3.5(c)(3). In many jurisdictions, jurors also receive instructions that they need not respond to any post-trial inquiries from counsel.

The present case arose because two jurors voluntarily reported their misgivings about the deliberations. A strict construction of Rule 606(b) is not necessary to protect jurors post-trial but will have the effect of frustrating jurors who seek to expose the possibility of a tainted verdict.

Moreover, permitting juror testimony on bias expressed during deliberations would not require any new procedural protocols. The screening mechanisms courts currently employ are the same as those used when allegations of external influences on jury deliberations arise pursuant to Rule 606(b)(2). Judges also screen claims that there is "good cause" to remove deliberating jurors under Rule 23(b). Fed. R. Crim. Pro. 23(b)(2)(B). *See, e.g.*, *United States v. Thomas*, 116 F.3d 606, 620 (CA2

1997). Granting review of evidence of racial or ethnic bias thus will not upset the existing balance between exposing juror misconduct and shoring up the finality and legitimacy of verdicts. As with allegations of racially-tainted remarks, claims of external influence are subject to corroboration and refutation. The only initial question is whether the information was received or the influence occurred. Impact on the verdict is a separate inquiry.

Faced, for example, with an allegation of bribery or receipt of extraneous information, a court first allows testimony to determine whether the act occurred. *See, e.g.*, *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (CA7 1991) (stating that the proper procedure is to establish "whether the communication was made and what it contained" "without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion"). The same basic objective analysis applies when allegations arise that jurors made racially prejudiced statements. Courts need only determine "whether the communication was made and what it contained." *Id.* They make no subjective inquiry into the impact of the communication on the deliberations.

Therefore, broader recognition of a constitutional exception would encompass only the objectively verifiable statements of a juror and would not require examination of the internal mental processes that Rule 606(b) was drafted to protect. *See* Fed. R. Evid. 606(b), Advisory Committee Note (the rule shields "mental operations and emotional reactions" during the jury's deliberative process); *see also Tobias v. Smith*, 468 F Supp. 1287, 1290 (W.D.N.Y. 1979) (allowing "objective evidence of

matters improperly introduced and considered by the jury in its verdict"). Courts need not analyze the jury's actual reasoning process or engage in an ex post assessment of whether the jury was affected by the racist assertions.

This is so in determining a remedy for the violation as well as its existence. The issue of remedy is not before the Court. Nor need the Court decide how lower courts should proceed to consider testimony about juror statements that reveal prejudice during deliberations. The only question presented is whether the evidence of bias lies behind the 606(b) shield. Indeed, the rule clearly states that it "does not purport to specify the substantive grounds for setting aside verdicts for irregularity." Fed. R. Evid. 606(b), Advisory Committee Note. Notably, however, none of the approaches that courts currently employ at the remedial stage would require evaluation of the jury's reasoning process during deliberations.

Under one approach, many lower courts have concluded that the Sixth Amendment right is violated "if even one member of the jury harbors racial prejudice." *United States v. Booker*, 480 F.2d 1310, 1311 (CA7 1973). According to this line of cases, proven racial bias on the part of a juror constitutes "a structural defect not subject to harmless error analysis." *State v. Phillips*, 927 A.2d 931, 934-36 (Conn. App. 2007); *see also State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998) ("Allegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial."). That conclusion would be consistent with this Court's holding in *Gray* that jury impartiality is "so basic to a fair trial that [its]

infraction can never be treated as harmless error." 481 U.S. at 668 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

In other jurisdictions, once the defendant establishes by a preponderance of the evidence that the jury was exposed to racially biased statements that may have infected the judicial process, the burden shifts to the state to show that there was no prejudice. Whether or not to grant a new trial turns on whether there is a "substantial probability that the alleged racial slur made a difference in the outcome." *Shillcutt*, 827 F.2d at 1159. Courts consider whether comments about the defendant's race or ethnicity would have "affected the verdict of a hypothetical average jury." *State v. Hidanovic*, 747 N.W.2d 463, 474 (N.D. 2008). A new trial only occurs where the "probable effect" of the racially charged comments was to taint the verdict. *See, e.g.*, *Villar*, 586 F.3d at 87 (district court determined on remand that the verdict was not tainted by the racially discriminatory statements and could stand).

This approach involves the same burden-shifting framework that operates when there are allegations of extraneous prejudicial information under Rule 606(b)(2). *See United States v. Williams-Davis*, 90 F.3d 490, 497 (CADC 1996) (questioning whether there is a reasonable possibility that the outside intrusion affected the verdict). Courts are already well-equipped to conduct the analysis, and it closely resembles the harmless-error review that occurs in a variety of contexts.

Courts confronting statements of racial bias may look, for example, to external indications like the jury's decision to acquit on some charges, *Shalhout*, 507 Fed. Appx. at 207, or overwhelming

evidence of guilt that reduces concern about racial bias infecting a verdict, *Fields v. Woodford*, 309 F.3d 1095, 1006-07 (CA9 2002). The admissibility inquiry turns only on the objective existence of the racial or ethnic prejudice and the nature and timing of the statements in question. But the remedial step can account for extrinsic indications of the impact on the verdict. Appellate courts also generally defer to a trial judge's factual determinations with regard to the impact that any racially or ethnically biased remarks about the defendant had on the deliberations. *State v. Levitt*, 176 A.2d 465, 468-69 (N.J. 1961).

In this case, the facts demonstrate both that an individual juror harbored substantial racial bias and applied that thinking to the determination of the defendant's guilt or innocence *and* that the bias was so frequently and clearly expressed that it tainted the deliberations as a whole. A juror's statements were "directly tied to the determination of the defendant's guilt." Pet. App. 26a (Marquez, J., dissenting). On more than one occasion during deliberations, a juror asserted that the defendant was guilty "because he's Mexican." Pet. App. 4a. The trial court in fact acknowledged that the juror testimony exposed prejudice in the deliberations, but then ruled that the bias could not support a new trial because of the no-impeachment rule. Tr. 3 (July 20, 2010).

In addition, petitioner's case was close and dependent on a problematic identification. It turned in important respects on the credibility of an alibi witness whose testimony the juror at the center of this appeal also discredited after (erroneously) labeling the alibi witness an "illegal." Pet. App. 4a-5a; Tr. 14 (Feb. 25, 2010). The jury then indicated

initial deadlock on all four charges and ultimately declined to convict on the most serious charge. The bias expressed here is thus severe, focused on the defendant's ethnicity, clearly connected with consideration of the facts of the case, and likely to have had an impact on deliberations.

In future cases in which a defendant proffers juror impeachment involving blatant expressions of racism as an argument in favor of guilt, every court should have access to the relevant testimony. There is no reason to think that jurors would forfeit meaningful protections as a result, or that courts would be incapable of screening for legitimate constitutional claims.

IV. THE POLICIES THAT RULE 606(b) SERVES ARE FURTHERED BY ALLOWING JUROR TESTIMONY IN CASES OF ALLEGED RACIAL OR ETHNIC BIAS.

Finally, there are expressive harms to applying the no-impeachment rule in cases in which the jurors, the court, the defendant, and potentially the public all know of overt discrimination for which there is no potential remedy. The Colorado Supreme Court's 4-3 decision in this case turned in large part on the policy implications of recognizing a constitutional exception to Rule 606(b). *See* Pet. App. 13a-15a. To be sure, the rule may give effect to concerns about intrusion into the jury room and public confidence in the finality of verdicts. But the scope of juror statements that would be considered under a narrow constitutional exception to 606(b) leaves the evidentiary exclusion largely intact. The category of potential juror testimony is sufficiently discrete that there is no danger of the exception swallowing the rule.

Furthermore, concern with "chilling" jury deliberations has no force when express racist speech is at issue. The jury necessarily enjoys some space for a "fruitful exchange of ideas and impressions," and jurors are "expected to bring commonly known facts and their experiences to bear in arriving at their verdict." *Shillcutt*, 827 F.2d at 1159. But there is nothing fruitful about racial animus. Racial and ethnic prejudice are "unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine." *United States v. Henley*, 238 F.3d 1111, 1119-20 (CA9 2001).

Occasional consideration of juror statements under a constitutional exception would not inhibit juror exchanges. As it is, jurors neither expect nor enjoy complete privacy surrounding their deliberations. Rule 606(b) has always permitted non-juror testimony as well as the use of pre-verdict statements. The rule further allows post-verdict testimony about external influences even by jurors, and it does not address juror revelations outside of court. "Juror journalism" and public discussion about jury service is not uncommon in high profile cases. The Colorado court's construction of the rule thus permits wide reporting in the public domain of racially prejudiced statements by jurors while precluding any redress in court.

Perhaps the strongest arguments favoring strict interpretation of Rule 606(b) concern the validity of jury decision-making itself, but those also lack force when weighed against the harm of racial or ethnic bias. Because of the nature of the statements at issue, there are important institutional interests that counsel in favor of permitting inquiry into alleged statements of racial

or ethnic prejudice. That inquiry could support not only the accuracy of criminal verdicts and the unbiased administration of justice, but also the integrity and legitimacy of the jury system as a whole.

It is true that jury discussions might, upon close scrutiny, fall short of ideals about the deliberative process. Jury perfection remains an "untenable goal." *Benally*, 546 F.3d at 1240. Racial prejudice is among the most dangerous of the jury's imperfections, however, and when it reveals itself openly, confronting the available evidence will do more to preserve the institution of the jury than ignoring it.

A rigid interpretation of Rule 606(b) in the face of allegations of racial or ethnic bias affects not only the fundamental fairness of the trial but the appearance of fairness in the public eye. Indeed, the injury of racist fact-finding is not limited to the criminal defendant deprived of a fair trial. As this Court has recognized, prejudice causes injury "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Rose*, 443 U.S. at 556. *See also McCollum*, 505 U.S. at 49 ("One of the goals of our jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."); *Batson*, 476 U.S. at 87 (stating that the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community" and "undermine public confidence in the fairness of our system of justice").

When a decision is based on bigotry, removing the deliberations from the court's purview damages rather than preserves the integrity of the jury. Both defendants and the public may become aware of racially biased statements by jurors through post-trial disclosures, and then look to the court to determine the constitutional significance of that bias.

If those "'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination" in the criminal justice system. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting). Considering testimony about openly expressed animus cannot "keep improper bias from being a silent factor with a particular juror." *Powell v. Allstate Ins. Co.*, 652 So.2d 354, 357 (Fla. 1995). It can, however, allow courts to address cases in which a juror clearly demonstrates prejudice against a defendant or that bias is "expressed so as to overtly influence others." *Id.* at 358.

This Court has stated that the jury system might not survive "efforts to perfect it." *Tanner*, 483 U.S. at 120. But neither can it survive efforts to protect it that shield explicit racial prejudice from review.

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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